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No. 01-896

IN THE
Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,
Petitioners,

v.

JOHN B. MCCAULEY *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The diversity statute establishes federal jurisdiction in all civil actions involving diverse parties where "the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a). Respondents would read the statute as if it said "sum or value *to the plaintiff*," which it plainly does not. In cases construing the statute, this Court has stated that "the amount in controversy is measured by the value of the object of the litigation." *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 347 (1977). Respondents would read those cases as if they said "value *to the plaintiff* of the object of the litigation," which they plainly do not. Other cases construing the statute have stated that a plaintiff *cannot*

create jurisdiction through joinder of monetarily insufficient individual claims. Respondents would read those cases as if they said that a plaintiff *can eliminate* jurisdiction through joinder of monetarily *sufficient* individual claims, which they plainly do not.

Our opening brief established that the "either viewpoint" rule for evaluating the amount of the object in controversy is authorized by the diversity statute, acknowledged by this Court's cases, and compelled by sound policy. When viewed from the petitioners' perspective, the value of the injunction requested in this case—that is, the fixed costs of reinstating the Rebate Program—well exceeds $75,000, whether measured on the basis of each individual plaintiff's claim, or as a common and undivided classwide demand.

In short, this case is no different from a public nuisance case—for example, where ten farmers, each of whom suffers $1000 in crop losses from a neighboring chemical manufacturing facility worth millions of dollars, sue to enjoin operation of the facility. In that example, the matter in controversy—the continued operation of a multimillion-dollar manufacturing facility—exceeds $75,000, even though each plaintiff farmer's stake in the controversy is worth a smaller amount. So it is here, except that respondents seek to compel the reinstatement of a business practice, rather than to abate it as a nuisance.

Rather than address the jurisdictional implications of the relief they affirmatively seek, respondents labor to recast their action altogether. Contrary to the plain terms of their own Consolidated Complaint, they now contend that the "object of the litigation" is *not* actually the reinstatement of the Rebate Program, but rather payment to each individual plaintiff of the monetary value of the rebates he or she assertedly could have accrued and redeemed had the Program continued. Because the value of *that* purported right, they contend, does not exceed $3500 per plaintiff, the jurisdictional threshold is not satisfied.

This effort at avoidance is unavailing. Respondents' elected to request damages *and* "specific performance of the Rebate Program," J.A. 62—what respondents describe (Br. 45) as a request "to keep the business practice going." It is undisputed that "keep[ing] that business practice going," even for just one plaintiff, would impose direct fixed human and technical resource costs on petitioners exceeding $75,000. Indeed, respondents themselves concede (Br. 37 n.27) that if their complaint is read as requesting reinstatement of the Rebate Program—in other words, if it is read as respondents themselves *wrote* it—then the amount-in-controversy requirement is satisfied. That should be the end of the matter.

ARGUMENT

I. RESPONDENTS FAIL TO JUSTIFY A "PLAINTIFF'S VIEWPOINT ONLY" RULE.

The threshold question in this case is whether the diversity statute bars courts from examining the "sum or value" of the "matter in controversy" in terms of the costs the relief sought by the plaintiff would impose on the defendant. As our opening brief explained, the text of the statute includes no such bar, and this Court's cases have not read one into the statute. Such a bar, moreover, would contradict the fundamental policies underlying the statute.

In reply, respondents manufacture an artificial and elusive distinction between "the object of the litigation" and the actual injunction a plaintiff requests.[1] According to respondents (Br. 20), the "object of the litigation" denotes solely "the right(s) sought to be protected by the complaint": It is

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[1] Respondents also suggest (Br. 18) that "strict construction" of the diversity statute militates in favor of barring consideration of the defendant's viewpoint. But respondents do not suggest *any* construction of the *text itself* that supports the "plaintiff's viewpoint only" rule. Indeed, strictly construed, the text supports only the "either viewpoint" rule. Pet. Br. 10-12.

not, they say, the actual injunction a plaintiff requests to protect that right. Accordingly, respondents assert, when an injunction is sought to protect a right, all that matters for purposes of the amount in controversy is the pecuniary value that the plaintiff will accrue from the protection of the right; the larger, fixed costs to the defendant of securing the plaintiff's right through the relief requested are immaterial.

Neither logic nor precedent support this effort to base federal jurisdiction on speculation about the supposed value of the "object of the litigation" as a concept distinct from the injunctive relief respondents actually request.

1. To begin with, equating the value of the "object of the litigation" with the value of the "right" to be gained by the plaintiff wholly begs the question: value *to whom* of that right? When it is clear that the protection of a right through an equitable order would impose a cost on the defendant greater than the value received by the plaintiff, there is no logical reason for courts to disregard the defendant's valuation. The fact that there is a difference between the value of the right a plaintiff seeks to gain and the cost to the defendant of providing that right does not establish that the object of the litigation is only the former, and not the latter.

Respondents' discussion of the "object" of their own litigation proves the point. Respondents assert (Br. 22) that "the *object* of the injunction sought is to force the Petitioners to pay each plaintiff what they [sic] are separately owed under their individual contracts," and that "[p]etitioners can relieve themselves of further liability by paying to each what they owe." According to respondents (Br. 21-22), "the object of this litigation . . . becomes abundantly clear from the realization that were Petitioners to give each putative class member $3,500 toward the purchase or lease of their next qualifying Ford vehicle, the 'controversy' relevant to the injunction sought would disappear."

This is incorrect. The only thing respondents' example makes "abundantly clear" is the *difference* between the individuated monetary payment suggested in their example and the actual injunctive relief their complaint seeks, *viz.*, the right to participate in the Rebate Program, and to accrue rebates toward the purchase of a Ford vehicle. Indeed, as we explained in our opening brief (Br. 28), respondents' injunction claim does not even seek any particular rebate payments—presumably because the amount of an individual's ultimate rebate entitlement depends in part on purchases *yet to occur* and, even then, would have value only if used to purchase a Ford vehicle. As a result, no class member has an individual, liquidated claim in any amount at present; instead, each has only an interest in re-establishing the Rebate Program.

To be sure, the presumed object of each individual class member *as a consumer* might ultimately be to accrue the maximum amount of rebates and to redeem those rebates through a qualifying purchase of a Ford vehicle. But that is not the "object" of *this litigation*, because respondents do not seek rebates in any particular amount—they seek only restoration of the right to accrue and use rebates *through the Program*. While each putative class member might be willing to *settle* his or her claim for injunctive relief for a $3500 individuated payment,[2] respondents' Consolidated Complaint demands "specific performance of the Rebate Program." J.A. 62. As the Seventh Circuit has explained, "[t]he amount in controversy is whatever is required to satisfy the plaintiff's

[2] Respondents cite no cases of this Court holding that a speculative settlement value determines the amount in controversy. Moreover, respondents seek not only damages and injunctive relief, but also punitive damages, which would figure into any settlement demand. While the question whether the non-aggregation rule affects punitive damages requests is not before the Court, the existence of respondents' request demonstrates the fallacy of focusing solely on the settlement value of some vaguely described "object of the litigation," as opposed to the *remedies* the plaintiff elects to put into controversy.

demand, in full, on the date suit begins." *Hart* v. *Schering-Plough Corp.*, 253 F.3d 272, 273 (7th Cir. 2001).[3] This is what it means for the plaintiff to be the master of his or her complaint, *see Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 399 (1987): The jurisdictional analysis focuses on the precise claims contained in the complaint, not on some more generalized notion of what the plaintiff class would be prepared to accept to settle or otherwise abandon those claims.[4]

2. The cases of this Court cited by respondents do not support their contention that the value of a requested injunction is determined solely by the value plaintiffs ultimately could obtain were the injunction granted. *Mississippi & Missouri Railroad Co.* v. *Ward*, 67 U.S. (2 Black) 485 (1862), is the clearest example. That case was an action to remove a bridge across the Mississippi River on a public nuisance theory. The Court held that "the removal of the [bridge] is the

[3] Although the test is commonly described as looking to the "object of the litigation," the analysis is actually conducted on a claim-by-claim basis, so that different claims can have different objects—here, the receipt of compensation, the receipt of a punitive damages award, disgorgement of unjust enrichment, and the receipt of certain injunctive relief. Were it otherwise, one could evaluate the claim for compensatory damages, *e.g.*, by looking to the value of the claim for injunctive relief. No cases support that approach; all of them analyze complaints on a claim-by-claim basis, as the court of appeals did below.

[4] Respondents suggest (Br. 13, 31-32) that establishing federal jurisdiction on the basis of the undisputed cost to petitioners of reinstating the Rebate Program would violate the rule that jurisdiction is to be "determined by the allegations of the complaint" and not on the basis of "subsequent pleadings by the defendant." Br. 32 (quoting *Great Northern Railway Co.* v. *Alexander*, 246 U.S. 276, 281 (1918)). That is incorrect. *Great Northern* and other cases simply establish that jurisdiction can only be premised on matters put in controversy by the complaint, and not on new objects of controversy introduced in later pleadings (such as counter-claims). Federal courts routinely hold evidentiary hearings or otherwise receive evidence—as done here (*see* J.A. 73-86, 87-89)—to establish the value of the claims raised in the complaint. *See* 14B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3702, at 70 (1998).

matter of controversy, and the value of the object must govern." *Id.* at 492. Notably, the Court understood that the matter in controversy was not the plaintiff's right to be free from the nuisance, but the injunctive relief requested, *i.e.*, removal of the bridge. Nor did the Court assess the value *to the plaintiff* of abating the public nuisance by removing the bridge.[5] The bridge was owned by the defendant, and the cost *to the defendant* of removing the bridge was deemed to be the value of the matter in controversy.

Though fully conceding that in *Ward* "the amount-in-controversy was measured by the *cost* to remove the bridge," respondents nevertheless insist that the case supports the "plaintiff's viewpoint" rule on the baffling ground that "the 'object of the litigation' [was] . . . valued in accordance with what the plaintiff sought to accomplish or obtain through the litigation." Br. 30 (emphasis added). True, the cost was valued in accordance with what the plaintiff sought to obtain, but what the plaintiff sought to obtain was the removal of the bridge, and that cost was imposed solely on the defendant.

Respondents' analysis of *Market Co.* v. *Hoffman*, 101 U.S. (11 Otto) 112 (1879), is likewise without merit. In *Hoffman*, over two hundred tenants of stalls in a market joined in an action seeking to enjoin the owner of the stalls from selling all the stalls to a third party. The Court upheld federal jurisdiction on the basis of the cost of the requested injunction to the defendant, citing evidence that, but for the injunction, the defendant could sell all the stalls together for a sum far exceeding the jurisdictional minimum. *See id.* at 113-14. Respondents contend (Br. 29) that *Hoffman* actually supports the "plaintiff's viewpoint" rule by observing that "the purpose of the lawsuit was to enjoin the sale [of all the

[5] Respondents' suggestion (Br. 30) that "the value of the litigation to the plaintiff was identical to the cost to the defendant" is thus unsupported. It is also unsupportable: Respondents do not explain how a plaintiff seeking the destruction of a bridge will obtain the exact same monetary value the bridge owner loses from its destruction.

stalls]," and thus that "the 'object of the litigation,' from the plaintiff's perspective also happened to be the cost to the defendant." Once again, it is true that prohibition of the sale of all the stalls was the "object of the litigation," but the Court did not say a word about the value *to the plaintiffs* of the right to continued use of the stalls. The only value the Court considered was the amount *the defendant* could have obtained by sale of all the stalls in the absence of the injunction.

Ward and *Hoffman* establish that when the plaintiff seeks to protect a right through an injunction, not only is the requested relief the object of the litigation, but the value of that object may be assessed from the defendant's perspective.[6] *See also Flast* v. *Cohen*, 392 U.S. 83 (1968) (noting that complaint seeking injunction against enforcement of federal statute involves expenditure of funds by defendant, without examining value of injunction to plaintiff). Not one of the other cases on which respondents rely (Br. 27-28) has held to the contrary.[7]

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[6] *Smith* v. *Adams*, 130 U.S. 167 (1889), on which respondents also rely (Br. 11, 20), likewise affirmatively supports jurisdiction. The *Smith* Court observed that "the value of the matter in dispute may be determined not only by the money judgment prayed [by the plaintiffs] . . . but . . . by the pecuniary result to *one of the parties* immediately from the judgment." *Id.* at 175 (emphasis added). Respondents misread a reference in *Smith* describing the "subject of litigation" as "the matter upon which the action is brought and the issue is joined, and in relation to which, if the issue be one of fact, testimony is taken" *id.*, to mean that testimony must be taken on the *value* of the subject of litigation. That is incorrect. *Smith* says only that the subject of the litigation can be ascertained by reference to what the testimony in the case will be about; obviously in this case almost all the testimony would center on the Rebate Program. Notably, in neither *Ward* nor *Hoffman* did the Court suggest that testimony as to the cost of the injunction would be a material issue at trial.

[7] Respondents cite *Russell* v. *Stansell*, 105 U.S. (15 Otto) 303 (1882), and *Ross* v. *Prentiss*, 44 U.S. (3 How.) 771 (1844), for the related proposition that the "object" of the litigation in an injunction case must be distinct from the cost of the injunction itself. Neither case supports that proposition. In *Stansell*, the plaintiffs sued to enjoin enforcement of a

For instance, respondents incorrectly state (Br. 25) that in *Glenwood Light & Water Co.* v. *Mutual Light, Heat & Power Co.*, 239 U.S. 121 (1915), "this Court specifically rejected the notion that jurisdiction could be established by the cost to the defendant." The district court had held that there was *no* jurisdiction because the defendant's costs were less than the jurisdictional minimum; this Court held only that the district court wrongly ignored the value to the plaintiff of its requested injunction. *Glenwood* thus "does not exclude the possibility that jurisdiction also will be present if the value to the defendant is greater than the statutory requirement, even when the benefit to the plaintiff is a lesser sum." 14B *Federal Practice and Procedure*, *supra*, § 3703, at 119-20.

The same is true for *Hunt* v. *New York Cotton Exchange*, 205 U.S. 322, 336 (1907) (rejecting defendant's argument that jurisdiction was improper simply because its own costs were less than the jurisdictional minimum), and *Bitterman* v. *Louisville & Nashville Railroad Co.*, 207 U.S. 205, 224-25 (1907) (finding jurisdiction on basis of the value of the business plaintiff sought to protect by enjoining defendant's

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series of small assessments against their lands, the total of which exceeded the jurisdictional minimum. 105 U.S. at 303-04. The Court's rejection of jurisdiction under those circumstances is wholly consistent with a finding of jurisdiction here. *See infra* at 15-16. In *Ross*, the defendant U.S. Marshall had levied a judgment debtor's land and planned to sell it to execute a judgment worth less than the jurisdictional minimum. Plaintiff, who had a preexisting security interest in the land, sued, claiming that the land was not properly chargeable with execution of the minor debt. Though plaintiff sought an injunction against the sale of the land on the theory that the sale might ultimately jeopardize his security interest in the land, the Court held that the request was only designed to prevent "contingent loss or damage" to the plaintiff from an adverse decision, and thus was wholly collateral to the "only matter in controversy between the parties," *viz.*, "the amount claimed on the execution," 44 U.S. (3 How.) at 772. *Ross* does not purport to require courts to disregard the cost of an injunction when it is actually the object of the litigation—as with removal of the bridge in *Ward*, or with the reinstatement of the Rebate Program here.

acts). In neither of those cases, nor any of the others cited by respondents, did the Court purport to bar courts assessing the amount in controversy from considering the cost to a defendant of granting a requested injunction. *See* 14B *Federal Practice and Procedure*, *supra*, § 3703, at 120 (proponents of "plaintiff's viewpoint" rule cannot point to "any Supreme Court decision rejecting subject matter jurisdiction when the statutorily prescribed amount in controversy was satisfied from the defendant's viewpoint, but not from the plaintiff's"); *Hoffman* v. *Vulcan Materials Co.*, 19 F. Supp. 2d 475, 480 (M.D.N.C. 1998) ("Courts which utilize the plaintiff-viewpoint rule are, of course, unable to cite to a Supreme Court decision that directly mandates it."); U.S. Br. 17 ("the Court has not held that the [amount in controversy] requirement cannot . . . be satisfied based on the value to the defendant of defeating the injunction").

3. Indeed, as respondents correctly point out (Br 32 n.27), a prospective defendant can almost always render itself a plaintiff for purposes of the "plaintiff's viewpoint only" rule by filing a preemptive declaratory judgment action. That only confirms the case for the "either viewpoint" rule. As the Solicitor General explains (Br. 13), the "plaintiff's viewpoint only" rule "would create an artificial incentive to sue for potential defendants who favor a federal forum, and could even prompt a race to the courthouse." If petitioners here had sued first for a declaration regarding their legal obligation to maintain the Rebate Program, the cost of doing so would obviously have been the value of the matter in controversy. The declaratory judgment example demonstrates why the fixed costs of reinstating the Rebate Program must be part of the amount-in-controversy calculus.

II. RESPONDENTS FAIL TO EXPLAIN HOW THE NON-AGGREGATION RULE DEFEATS JURISDICTION WHERE THE COST TO A DEFENDANT OF A REQUESTED INJUNCTION EVEN AS TO ONE PLAINTIFF WOULD EXCEED $75,000.

The uncontroverted record evidence establishes that the "fixed costs to [petitioners] of reinstating and maintaining the [Rebate Program] would be the same whether it is done for one plaintiff or for six million." J.A. 118. That is, while it would be one thing for petitioners simply to give a single plaintiff $3500 in cash or credits toward the purchase of a Ford vehicle, it is another thing entirely for petitioners to invest the human and technical resources necessary to maintain a cross-corporate system of identifying and tracking purchases, and assigning, tracking, and verifying appropriate rebates, regardless of the number of consumers expected to participate in that system. J.A. 88-89 (Behar Decl.). The latter is exactly what the complaint requests; as respondents themselves state (Br. 45):[8]

> Pre-litigation, the Petitioners had the Rebate Program in place, the business apparatus had been designed, employees had been hired, and the Rebate Program was operational. The injunction requested, at the time the suit was filed, was simply to keep the business practice going as a means to compensate Plaintiffs for the damages suffered.

The fact that "keep[ing] the business practice going," as respondents specifically request in the complaint, would entail wholly fixed costs exceeding $75,000 is neither surprising nor disputed.

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[8] *See Pegram* v. *Herdrich*, 530 U.S. 211, 230 n.10 (2000) (party's brief may be used to "clarify allegations" in complaint).

Respondents contend that the non-aggregation rule—which bars a court from joining monetarily insufficient individual claims of multiple plaintiffs in a single action—bars consideration of these fixed costs simply because one plaintiff has joined with others to obtain the requested injunction. That is plainly incorrect, whether the complaint in this case is viewed either (a) as stating separate and distinct claims for reinstatement of the Rebate Program or (b) as asserting a common and undivided interest in participation in that Program. In the former case, jurisdiction is proper because each plaintiff's individual claim would impose fixed costs exceeding $75,000; in the latter case, the non-aggregation rule simply has no application.

1. Respondents appear to have missed the first of the two alternative arguments in our brief. They say (Br. 39-40) that we "concede that plaintiffs' claims are separate and distinct," and that we argue only that "the relief sought . . . is common and undivided." But we have never conceded that the claims are necessarily separate and distinct. What we demonstrated (Br. 18-26) was that *even if they are*, each distinct claim is jurisdictionally sufficient on its terms.

Respondents themselves do not dispute that the non-aggregation rule cannot bar jurisdiction where each separate and distinct claim for injunctive relief is jurisdictionally sufficient on its own terms.[9] Instead, they suggest that the facts

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[9] Respondents' amicus Trial Lawyers for Public Justice ("TLPJ") argues (Br. 8, 12) that although jurisdiction may be proper when one plaintiff seeks an injunction that would cost the defendant more than $75,000, jurisdiction does not lie if enough plaintiffs are joined such that dividing the cost of the injunction among them reduces each individual's share of the costs to less than $75,000. That kind of rule would flatly contradict the settled proposition that joinder rules may neither expand nor limit jurisdiction. Resp. Br. 21; U.S. Br. 21-22. We have already explained why *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), does not compel that result, as TLPJ contends (Br. 12): *Zahn* holds only that jurisdiction may not be derived by aggregating individually insufficient claims; there simply *is no aggregation* when each plaintiff's claim for an injunction, viewed individually, would exceed $75,000.

of this case do not support jurisdiction on that basis.[10] That suggestion is manifestly incorrect.

a. Respondents first state (Br. 42) that the district court in this case "found that Petitioners failed to prove" that the fixed costs to petitioners would actually exceed $75,000. Respondents are wrong.[11]

Respondents rely on the district court's comment that petitioners "failed to show that the *value* of the injunction as to any one cardholder would exceed $75,000." J.A. 97 (emphasis added). But that comment does not reflect a "finding" that petitioners failed to prove that the *cost* of reinstituting the entire Rebate Program as to only one plaintiff would exceed $75,000. Indeed, as we have described in detail (Br. 3, 15-16), the district court acknowledged the undisputed evidence that "the fixed costs in operating a rebate program . . . exceed $75,000 per year, [and] would not depend on the extent of cardholder usage." J.A. 96 (internal quotations and citation omitted). The court simply concluded, erroneously, that as a matter of law such fixed, programmatic costs are irrelevant because the maximum "value" any individual cardholder could possibly accrue under the Program could not exceed $3500. J.A. 96-97. That conclusion simply re-

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[10] Respondents (Br. 3) note that in the district court, petitioners opposed class certification in part on the stated grounds that the case "does not involve a common fund or a joint interest among cardholders. Instead, it involves a collection of individual claims based on individual patterns of consumer purchasing decisions." J.A. 92 n.2. That statement is in no way inconsistent with our principal submission that, even if petitioners must comply with the requested reinstatement of the Rebate Program for the benefit of a single plaintiff, the cost of doing so will well exceed the statutory threshold.

[11] Indeed, respondents elsewhere properly concede (Br. 37-38 n.27) that the cost to petitioners of complying with the requested injunction exceeds the jurisdictional minimum.

flects the same legal error underlying petitioners' argument here, *viz.*, that the "object" of a claim for an injunction is somehow distinct from the claimed injunction itself.

b. Respondents also suggest (Br. 42-43) that attributing the cost of complying with the injunction to both Ford and Citibank would entail impermissible defendant-side aggregation. Again, this misconceives the principle of non-aggregation. Impermissible aggregation is a matter of adding together different *claims*, not assessing the value or cost of *a single claim* made jointly against two defendants. As respondents' amicus explains: "In cases involving more than one defendant, a plaintiff may aggregate the amount claimed against multiple defendants 'only if the defendants are jointly liable.'" Ass'n of Trial Lawyers of America Br. 10 (quoting *Middle Tennessee News Co.* v. *Charnel of Cincinnati, Inc.*, 250 F.3d 1077, 1081 (7th Cir. 2001)); *see Walter* v. *Northeastern Railroad Co.*, 147 U.S. 370, 373 (1893) ("[W]hen two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the joint or several character of the liability to the plaintiff."). Because respondents' claim here asserts joint liability,[12] the only question is whether the cost of that liability would exceed $75,000—regardless of which, or how many, defendants will ultimately have to shoulder those costs.

c. Respondents finally suggest (Br. 43) that the "ministerial or administrative" costs of complying with an injunction should be disregarded. That argument is incorrect and, in any event, inapplicable here.

To begin with, nothing in the text or purpose of the diversity statute supports dividing defendants' costs into "acceptable" and "unacceptable" categories. *See* Pet. Br. 23.

[12] The complaint alleges, for example, that the petitioners acted together to issue credit cards under the Program (J.A. 49, 52), deceived respondents through uniform mail solicitations (J.A. 52, 57), and jointly operated the Rebate Program (J.A. 49; Resp. Br. 45).

Any such distinction would be guaranteed to breed wasteful jurisdictional litigation. *Id.*

This Court nevertheless need not decide in this case whether "ministerial or administrative" costs are properly excludable, for the costs at issue cannot fairly be so categorized. As noted above, respondents themselves acknowledge (Br. 45) that their claim for injunctive relief seeks to "keep the business practice going." While it is of course true that courts exclude from the amount-in-controversy calculus "objects which are merely collateral or incidental to the determination of the issues raised by the pleadings," *Healy* v. *Ratta*, 292 U.S. 263, 268 (1934), the costs of maintaining the Rebate Program are not "merely collateral or incidental" to the object of this litigation. They *are* the object, because what respondents seek is to "keep [the Rebate Program] going." Those costs are indistinguishable from the costs to the defendant of removing the bridge at issue in *Ward*, or of shutting down a hazardous-waste generating facility, or of conducting a research study. *See* Pharma. Res. Br. 19.[13] They are completely distinct from purely collateral compliance costs, such as the costs of copying an injunction and notifying all personnel of its strictures. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 610 (7th Cir. 1997).

The facts of *Snow* v. *Ford Motor Co.*, 561 F.2d 787 (9th Cir. 1977)—a case respondents (Br. 44) mistakenly conclude would have been removable under our analysis—exemplify this point. The plaintiff class in *Snow* challenged Ford's failure to provide an $11.00 wiring kit with certain auto trailer

[13] Respondents err in suggesting (Br. 24 n.17) that the costs of reinstating the Rebate Program are irrelevant because petitioner Citibank might profit from reinstatement of the Program. A speculative *allegation* of some future economic benefit does not alter the *undisputed record fact* that reinstating the Program would impose immediate fixed costs of greater than $75,000. *See also* J.A. 54 (the complaint alleges in any event that, prior to termination the Program "was quickly becoming unprofitable due to its success").

packages. The complaint sought $11.00 in damages for each purchaser, $5 million in punitive damages, and an injunction requiring Ford to provide the kit in all future packages. 561 F.2d at 790. The plaintiffs did *not* seek the establishment (or abatement) of a particular business operation; what they sought was the provision of a particular thing of value. Obviously, there was no evidence that providing the $11.00 kit to a single plaintiff would impose costs on Ford exceeding the jurisdictional minimum. The relief requested in *Snow* thus differed from an individuated damages request only in that it sought provision of an object, rather than money. *Cf. Campbell* v. *General Motors Corp.*, 19 F. Supp. 2d 1260, 1267 (N.D. Ala. 1998) (finding "no meaningful distinction between money damages and in-kind replacement of a defective part").

Here, by contrast, respondents do not seek a particular thing, or a liquidated rebate amount. Unlike *Snow*, this is simply not "a class action that constitutes nothing more than the joinder/consolidation of multiple suits for $3,500 or less." TLPJ Br. 17. On the contrary, respondents seek to compel petitioners to re-initiate a specified business operation, which will cost petitioners more than $75,000 to do, even if only a single plaintiff ever chooses to avail himself or herself of the benefits of that business operation. *Cf. In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 718 (D. Md. 2001) (jurisdictional minimum satisfied where injunction sought to compel company to "redesign[] its operating system software," which "would cost millions of dollars"). The difference between *Snow* and this case demonstrates precisely why not every request for an injunction in a case involving a large defendant will support jurisdiction. Assuming there is complete diversity, the question will be whether the cost of complying with the injunction for even a single plaintiff exceeds $75,000 because it seeks to alter a business operation, or only as the impermissible result of aggregating jurisdictionally insufficient per-plaintiff costs.

2. As our opening brief demonstrated (Br. 26-31), jurisdiction is also proper because the respondents assert a common and undivided interest in participation in the Rebate Program. Indeed, the claim for reinstatement of the Rebate Program shares the principal characteristics of claims previously identified by this Court as "common and undivided." And when a claim is "common and undivided," the non-aggregation rule is simply inapplicable. The value of the matter in controversy is the overall value of the monetarily sufficient common and undivided claim. *See Snyder* v. *Harris*, 394 U.S. 332, 341 (1969); *Troy Bank* v. *G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1973).[14]

Respondents' only argument that the interest they assert is not common and undivided depends, again, upon a distinction that this Court has never recognized and that their own complaint refutes. In respondents' view, the "claim" of any single plaintiff is not the specific relief the complaint seeks but rather the pecuniary value of the *benefit* he or she would realize from an award of that relief. But respondents cite no cases from this Court in support of that distinction. Indeed, to the contrary, many cases discussing characteristics typical of common and undivided claims focus explicitly on the nature of the relief at issue. *See, e.g., Texas & Pac. Railway Co.* v. *Gentry*, 163 U.S. 353, 360-61 (1896); *Shields* v. *Thomas*, 58 U.S. (17 How.) 3, 5 (1854).

Moreover, the Consolidated Complaint itself demonstrates that respondents' "claim" is not for individuated bene-

[14] Respondents incorrectly describe (Br. 40) our argument as stating that because their claim for reinstatement of the Rebate Program is common and undivided, "its value to Plaintiffs may be aggregated to meet the jurisdictional threshold." That is decidedly *not* our argument. First, the question of individual value "to Plaintiffs" is irrelevant. When plaintiffs seek common and undivided relief, the total cost to the defendants is sufficient to establish jurisdiction under the either viewpoint rule. Second, if that relief is in fact common and undivided, then it is of no consequence whether the value of the claim to any one plaintiff is above or below the jurisdictional minimum.

fits, but rather for reinstatement of a program in which they have a common and undivided interest. In their brief, respondents argue (Br. 41) that since "each class member will be owed a separate rebate amount and damages, assuming the lawsuit is successful," therefore "aggregating Plaintiffs' claims would violate the non-aggregation principle." But that description of respondents' "claims" ignores the fact that the claim at issue does not *seek* "rebate amount[s] and damages" (nor could it, *see* p. 5, *supra*), but rather reinstatement of the Rebate Program. Ultimately, if their action is successful, individual respondents will avail themselves of differing levels of rebates under that Program, but in this litigation itself they all share the *same* interest in the *right to seek* rebates under the common "business practice." *See Gibbs* v. *Buck*, 307 U.S. 66, 71-76 (1939) (plaintiffs with individual copyright licenses under integrated licensing scheme have common and undivided interest in enjoining enforcement of state law barring blanket licensing of copyrights); *Hoffman*, 101 U.S. (11 Otto) at 113-14 (plaintiffs with individual market stall-use contracts have common and undivided interest in enjoining common re-sale of stalls).

III. THE COURT OF APPEALS CORRECTLY DETERMINED ITS APPELLATE JURISDICTION.

The Solicitor General, supporting petitioners, obliquely raises an issue regarding appellate jurisdiction. U.S. Br. 4 n.1. The court of appeals explicitly and thoroughly evaluated that issue and correctly concluded that the judgment of the district court was an appealable dismissal of the action, not a nonappealable remand order. Pet. App. 6a. Respondents took no issue with that determination in the opposition to certiorari, and do not raise any issue now.

The removed state-court actions in this case were consolidated in the district court pursuant to the multidistrict litigation ("MDL") statute. There, respondents voluntarily elected to "bring *this* action [*i.e.*, the Consolidated Complaint] on behalf of themselves and all other persons similarly situated." J.A. 49 (emphasis added). The operative action, therefore, is the self-described "consolidated class action,"[15] which differs significantly from the underlying state-court complaints. For example, only two of the underlying complaints sought specific performance of the Rebate Program—and even those complaints sought specific performance only as an alternative to compensatory damages. Another underlying complaint disclaimed injunctive relief altogether. When plaintiffs voluntarily file an amended complaint under these circumstances, it supersedes their prior state-court actions. *See, e.g., Eyak Native Village* v. *Exxon Corp.*, 25 F.3d 773, 781 (9th Cir. 1994); *In re Ticketmaster Corp. Antitrust Litig.*, 929 F. Supp. 1272, 1275 (E.D. Mo. 1996), *aff'd in part and rev'd in part on other grounds sub nom. Campos* v. *Ticketmaster*, 140 F.3d 1166 (8th Cir. 1998); *see also* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1476 (2d ed. 1990) (amended complaint supersedes previously filed complaints); 3 James Wm. Moore et al., *Moore's Federal Practice* § 15.17[3] (3d ed. 2002) (same).[16]

The district court's order was thus necessarily a dismissal of the current action, not a remand. And although the jurisdictional dismissal was entered nominally in petitioners' favor, it was not favorable to them, because it deprived petitioners of their right to a federal forum for litigation of the claims against them. This Court has acknowledged that even

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[15] J.A. 49; *cf.* Resp. Br. 4 n.2 (acknowledging that the district court intended to dismiss and "dispose of *the* federal action" (emphasis added)).

[16] It has been suggested that when an MDL court *orders* the filing of a consolidated complaint purely for administrative convenience, the new complaint may not supplant the prior actions. 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2382 (1995). But where the plaintiffs *voluntarily elect* to file an amended complaint, as they did here, then the new complaint defines the action and the prior actions no longer exist, as the authorities cited in the text explain.

a party on whose behalf a judgment is nominally entered may appeal, when the party is sufficiently "aggrieved" by the judgment so as to "retain[] a stake in the appeal." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 236, 333-34 (1980); *see Forney* v. *Apfel*, 524 U.S. 266, 271 (1998). So it is here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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